

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

MERGENT SERVICES and JOHN BAL,
Plaintiffs,

Index No.: 601777/07

Motion Date: 04/24/12

- v -

Motion Seq. No.: 005

ITEX CORPORATION, NYTO TRADE CORPORATION,
JOHN CASTORO, personally and in the
capacity of President and CEO, IZZY GARCIA,
personally and in the capacity of Manager,
CORAL HOMOKI, Trade Director, MICHAEL
MARICH, Trade Director, JESSICA TAVERAS,
Trade Director, and NEW YORK DAILY NEWS,
Defendants.

Motion Case No.: **FILED**

APR 01 2013

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 4 were read on this order to show cause to reargue Order dated November 11, 2011 restoring action to the calendar.

Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1, 2

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Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that defendant ITEX Corporation's motion to reargue this court's order dated November 17, 2011 is granted and upon reargument the court vacates such prior order that vacated the court's order dated January 14, 2008 granting defendant ITEX Corporation's cross motion to dismiss the complaint, and that order dated January 14, 2008 dismissing the complaint against ITEX Corporation shall be reinstated, and the complaint against ITEX Corporation shall be dismissed.

Defendant ITEX Corporation is correct, and pro se plaintiff agrees, that as pro se plaintiff Bal never demanded that defendant ITEX Corporation arbitrate, defendant ITEX

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Corporation cannot be found to have waived its right to the enforcement of the arbitration clause of the agreement. See Island Cash register v Data Term Sys, 244 AD2d 117 (1st Dept 1998). In restoring the complaint against defendant ITEX Corporation only, this court overlooked facts by conflating the defendants Castoro, Garcia, who are principals of NYTO Trade Incorporation, and NYTO Trade Incorporation, an independent contractor of ITEX Corporation, with defendant ITEX Corporation. In misapprehending such facts the court restored the complaint against the incorrect defendant, as there was no basis to find that defendant ITEX waived its right to arbitrate.

Plaintiff does not move to reargue such order of the court and only requests that the action be restored against defendants NYTO Trade Incorporated, Castoro and Garcia as part of his opposition papers to defendant ITEX Corporation's motion. As no notice to reargue has been provided to such defendants, the court may not grant such relief. McCann v McCann, 75 AD2d 534 (1st Dept 1980).

Accordingly, it is hereby

ORDERED that the motion of defendant ITEX Corporation to reargue this court's order dated November 17, 2011 is granted, and upon reargument, the court vacates its order dated November 17, 2011 and denies plaintiff's motion to vacate this court's prior order dated January 14, 2008, and that order dated January 14, 2008 is reinstated and the complaint against defendant ITEX Corporation is dismissed; and it is further

ORDERED that the Clerk shall enter judgment dismissing the complaint against defendant ITEX Corporation.

This is the decision and order of the court.

Dated: March 26, 2013 **FILED**

ENTER:

APR 01 2013

DEBRA A. JAMES
J.S.C.

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NEW YORK
COUNTY CLERK'S OFFICE